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No. 431

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES, PETITIONER

v.

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, AND PAUL H. BEUTTAS, TRADING AS B–W CONSTRUCTION CO., NOT INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above-entitled case on June 5, 1944.

OPINIONS BELOW

The opinions of the Court of Claims (R. 34–45) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered June 5, 1944 (R. 45). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether Article 15 of a standard form Government contract, which provides that the decision of the head of the department on "all disputes concerning questions arising" under the contract shall be final and conclusive upon the parties, applies to a finding by the head of the department that the contractor's payment of higher wages than those specified in the contract were not caused by acts of the Government.

2. Whether, if Article 15 of the contract was intended to apply, it could validly be agreed to by the parties.

3. Whether the Government, in inviting bids for superstructures to be erected under separate and later contracts, specifying minimum wages which were higher than those fixed in respondents' contract for the foundations, thereby violated an implied obligation in respondents' contract.

CONTRACT PROVISIONS INVOLVED

The contract provisions involved are set forth in the Appendix, *infra*, pp. 18–22.

STATEMENT

Respondents, who are engaged in the building construction business in Chicago, entered into a contract with the United States on November 26, 1935, to construct the foundations of the Jane Addams Houses, a Public Works Administration

project in Chicago (Fdgs. 1, 2). The work was duly completed some time in June 1936 (Fdg. 14).[1]

The contract provided (Art. 18) that employees engaged on the project should receive the minimum wages listed in the specifications, and that the "Government will not consider any claims for additional compensation made by the Contractor because of payment * * * of any wage rate in excess of the applicable rate" specified therein (Spec., Div. I, sec. 12, pars. 1 and 4). The contract also provided (Art. 19) that the listed wage rates were subject to change by the Federal Emergency Administrator of Public Works, in which event the contract price was to be "adjusted accordingly on the basis of all actual labor costs on the project to the Contractor" (Fdg. 5).

On February 15, 1935, the Government issued an invitation for bids for the superstructures of the buildings for which respondents were constructing the foundations. That invitation specified minimum wage rates which were higher than those being paid to respondents' employees, who were unionized. The Government did not request that respondents pay the higher rate of wages, but in February or March 1936 the Union

[1] The work was to be completed within 75 calendar days after receipt of notice to proceed (i. e., by February 23, 1936), but completion was delayed by various change orders and other causes for which extensions of time were granted by the United States (Fdgs. 2, 9).

of respondents' employees called a strike to compel respondents to pay wages equal to those specified for the superstructures, and respondents acceded to the Union's demand for payment of the higher wage rates retroactively to January 8, 1936. (Fdg. 12.) The Government did not participate in the negotiations between respondents and the strikers (Fdg. 13).

Respondents claimed reimbursement for the increase in wages, and a dispute arose as to the right thereto (Fdg. 14). This dispute, together with other items of claim, was duly submitted to the contracting officer, who rejected the wage claim (Fdg. 15).[2] Respondents thereupon appealed to the Assistant Administrator of Public Works who rendered a written decision with findings of fact on June 29, 1936, wherein he found that "the increase in wage rates was occasioned by no fault of the Government," and rejected the claim (Fdg. 16). Respondents then petitioned

[2] The other items of claim consisted of damages alleged to have resulted from the delay caused by the Government. These claims were duly presented to the contracting officer and the head of the department, who found that the respondents were entitled to $8,727.44 therefor. Petitioners and respondent stipulated below that respondents were entitled to recover that amount for all claims other than those resulting from wage increases, and that judgment might be entered for that amount. (Fdg. 11.) Consequently, those parts of the findings below relating to delay and the damages occasioned thereby (especially Fdgs. 7, 8, 9, 10, and 11) are not material to this petition.

the Federal Emergency Administrator of Public Works to decide the claim, and on May 20, 1937, in a letter to the Comptroller General, the Administrator made findings of fact, conclusions and recommendations disallowing the wage item. He found that the increased wages were caused by the new wage agreement signed by respondents with the Union after the contract with the Government was entered into, and not by the acts of the Government in advertising for the construction of the superstructure at increased wage rates. (Fdg. 18.) The Comptroller General thereupon refused to authorize payment of the controverted item (Fdg. 20), and respondents brought suit in the Court of Claims. That court entered judgment for respondents.[1]

The three judges in the majority[2] held that the specification by the Government of higher minimum wages for the superstructures required respondents, "as a necessary consequence," to pay higher wages on their job, and was a breach of the implied obligation of the United States to refrain from any action which would make respond-

[1] The judgment in the amount of $13,388.27 consists of $4,660.83 as the excess wages paid, and $8,727.44 as the stipulated recovery on account of the changes and delays (see n. 2, p. 4, *supra*).

[2] Judge Whitaker delivered "the opinion of the court," in which Chief Justice Whaley alone concurred; Judge Madden wrote a separate concurring opinion; and Judge Littleton wrote a dissenting opinion. Judge Jones did not participate in the decision.

ents' performance more expensive.[5] The majority further held that Article 15 of the contract was not intended to authorize Government officials to decide questions of breach of contract; but if it were so intended, it was illegal.[6]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that by inviting bids for the superstructure at minimum wage rates higher than those set forth in respondents' contract the United States violated an implied obligation of that contract.

(2) In rejecting administrative findings of fact that the increased wages paid by respondents were not caused by such an invitation for bids, without finding that such administrative findings were arbitrary, capricious or so grossly erroneous as to imply bad faith.

(3) In holding that such findings related solely to a question of law.

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[5] The opinion of Judge Whitaker and Chief Justice Whaley also held that the United States, by fixing a higher wage for the superstructures on the same buildings, had "indirectly" established a higher minimum wage under respondents' contract and was therefore obligated to pay the increase under Article 19 of the contract.

[6] Judge Whitaker and Chief Justice Whaley placed this conclusion on the ground that such a stipulation constituted an attempt in advance of a controversy to deprive a party of recourse to the courts; and that it unconscionably circumscribed the jurisdiction conferred upon the Court of Claims by Section 145 of the Judicial Code (28 U. S. C. 250) to hear and determine claims founded upon Government contracts.

(4) In holding that Article 15 of the contract was not intended to make the decision of the head of the department final and conclusive on "disputes" concerning questions arising under" the contract if such questions are of law or involve a possible breach of contract by the Government.

(5) In holding that a contrary construction of Article 15 would make that provision illegal.

(6) In holding that it was beyond the competence of the parties to confer authority upon the head of the department to make conclusive rulings on questions of law, and in particular on questions involving a breach of contract.

(7) In entering judgment for respondents for the increased wages paid by them.

REASONS FOR GRANTING THE WRIT

The form of Government contract here involved is "U. S. Government Form P. W. A. 51" and is identical with those considered by this Court in *United States* v. *McShain*, 308 U. S. 512, and *United States* v. *Blair*, 321 U. S. 730. Its critical provisions differ from those in the standard form of Government construction contract in that the latter limits the finality of administrative decision to questions of fact. See *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 58. Article 15 of the contract provides that, with the exception of labor disputes, all "disputes concerning questions arising under this contract shall be decided by the Contracting Officer, * * * subject to

written appeal by the Contractor * * * to the head of the department * * * whose decision shall be final and conclusive upon the parties thereto as to such questions." In the instant case, after concluding that the action of the Government in specifying higher minimum wage rates for the construction of the superstructure constituted a breach of an implied condition of respondents' contract, the Court of Claims has held that this raised a question of law to which Article 15 was not intended to apply, and that if applicable to such a question of alleged breach of contract Article 15 is illegal and void. In so holding, we submit that the court below has erroneously decided important questions of Government contract law in a manner which cannot be reconciled with the controlling decisions of this Court delimiting judicial review of administrative settlement of Government contract claims.

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ave suggested on several recent occasions that the Cour[illegible] Claims inadequately recognized the right of the United States to provide by contract for the administrative settlement of disputes arising under its construction contracts. See petitions for a writ of certiorari in *United States* v. *McShain*, No. 43, October Term, 1939, pp. 6–9 (rev'd, *per curiam*, 308 U. S. 512); *United States* v. *Callahan Walker Co.*, No. 65, October Term, 1942, pp. 8–12 (rev'd, 317 U. S. 56); *United States* v. *Blair*, No. 75, October Term, 1943, pp. 18–19 (rev'd, 324 U. S. 730). No reference to these decisions appears in either of the majority opinions. The present holding formulates a theory of law forecast by the court's prior opinions in *Langevin* v. *United States*, 100 C. Cls. 15; *Bein* v. *United States*, No. 44619, decided December 6, 1943, slip. ops., pp. 22–26.

Article 15 of the contract requires an administrative settlement of disputes of the character here involved. The dispute centered on the causal relationship between the higher wage rates prescribed by the Government in its invitation for bids for the superstructure work, and respondents' payment of like wages on the foundations, concededly without any request or directions to do so by the Government. Intervening between these two acts were a strike by the Union of respondents' employees and a settlement thereof by agreement to pay the higher wage rate following negotiations in which the Government concededly did not participate. The administrative officials in considering the dispute did not misconceive the issues. The Assistant Administrator found that "the increase in wage rates was occasioned by no fault of the Government." (Fdg. 16). The Administrator found that not the acts of the Government but the signing of a new agreement with the union was the cause of the wage increase (Fdg. 18). Similar issues of proximate causality are traditionally treated as factual for resolution by a jury. *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 354; *Tennant* v. *Peoria & P. U. Ry.*, 321 U. S. 29, 34-35; *Milwaukee & St. P. Ry.* v. *Kellogg*, 94 U. S. 469, 474. The findings of the Assistant Administrator and of the head of the department on this issue should have been accepted by the court below in the absence of a proper judicial finding that the administrative

determination was arbitrary, capricious, or so grossly erroneous as to imply bad faith. *Kihlberg* v. *United States*, 97 U. S. 398, 402; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553–554; *Plumley* v. *United States*, 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Goltra* v. *Weeks*, 271 U. S. 536. No such judicial finding was made.[*]

Under Article 15 as it appeared in the contract, this should have been the scope of judicial review even if the issue be regarded as legal in nature. It is clear that the parties to the contract acted upon the belief that the specified officers had authority under Article 15 of the contract to pass upon the dispute in question and that it was submitted to them for that purpose. There is nothing in Article 15 which would exclude from its scope disputes which can be said to involve a "breach of contract." In a sense, every dispute revolves about a breach of contract, for any claim under the contract, and its denial, is predicated upon the contention that the contract does or does not require the action sought or refused. And in order to determine the question of a breach it is frequently necessary to interpret the rights and obligations created by the contract and specifications, a function which this Court has recognized

[*] Nor could such a finding rightly have been made, for, as indicated *infra*, pp. 14–17, it was entirely reasonable to conclude that respondent's increased wage cost was not due to any mandate or fault of the Government.

may be entrusted to administrative disposition. See *United States* v. *McShain*, 308 U. S. 512, 520; *Plumley* v. *United States*, 226 U. S. 545, 547; *Ripley* v. *United States*, 223 U. S. 695, 704; *Sweeney* v. *United States*, 109 U. S. 618, 620.

2. In rejecting the Government's construction of Article 15, the court below held that the parties could not validly stipulate that the finding of an administrative officer should be final as to whether either party had broken an expressed or implied term of the contract. That holding, we submit, runs counter to the applicable decisions of this Court. The Court stated in *United States* v. *Gleason*, 175 U. S. 588, 602, 604:

> Another rule is, that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all or specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts.
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> * * * * * * *
>
> * * * In other words, the parties agreed that if the contractors should fail to complete their contract within the time stipulated, they should have the benefit of the judgment of the engineer as to whether such failure was the result of their own fault or of forces beyond their control, and, in the latter event, of his judgment as to

> what extension of time would be just and reasonable. Obviously the object of the provision in question was to prevent the very state of dispute and uncertainty which would be created if the present contention of the contractors were to prevail.

In *United States* v. *McShain*, 308 U. S. 512, 520, this Court in a *per curiam* opinion reversed the decision of the court below (88 C. Cls. 284) which had limited to questions of fact the applicability of the identical Article 15 here involved. Cf. *United States* v. *Blair*, 321 U. S. 730.

Other decisions of this Court have repeatedly recognized that authority may be validly conferred by the contract upon a designated officer, including an agent of the Government, to make final decisions on disputed matters arising under the contract, including questions usually regarded as issues of law. *Goltra* v. *Weeks*, 271 U. S. 536, 547–548; *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, 326; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Plumley* v. *United States*, 226 U. S. 545, 547; *Ripley* v. *United States*, 223 U. S. 695, 704; *Sweeney* v. *United States*, 109 U. S. 618, 620; *Kihlberg* v. *United States*, 97 U. S. 398, 402; *Bayne* v. *Morris*, 1 Wall. 97; cf. *Burchell* v. *Marsh*, 17 How. 344, 350–351. In most of these cases, the contract provided that the designated official should determine whether one party to the contract had complied with his obligations thereunder. A finding that he had

not was, of course, a finding that he had broken the contract; a converse finding would be a finding that there was no breach. In the majority of these cases the designated official did pass upon such matters, and it is implicit in the opinions that such matters could properly be left for decision to an officer of the Government. In both the *Mason & Hanger* and the *Merrill-Ruckgaber* cases the contention was made, as in the present case, that it was beyond the competence of the contracting officer to decide a legal question. In each case the contention was rejected.[9]

These decisions constitute an answer to the view expressed in Judge Whitaker's opinion that if Article 15 is applicable to the instant dispute it is against public policy as an agreement to preclude recourse to the courts, and as an agreement conflicting with the statutory jurisdiction of the Court of Claims to hear and determine contract claims against the United States (Jud. Code § 145). The cases relied upon by the court below to support the first of these propositions were cases where state law sought to preclude access to the federal courts, or where all resort to courts was barred by agreement. Here there is

[9] See Brief for the United States in *United States* v. *Mason & Hanger Co.*, Nos. 121-122, October Term, 1923, pp. 17-18; Petition for the United States for Rehearing, pp. 25-26; Brief for the United States on rehearing, p. 7; Brief for Appellant in *Merrill-Ruckgaber Co.* v. *United States*, No. 281, October Term, 1915, pp. 11, 14.

neither. The claimant is free to resort to the courts, the only effect of the stipulation being to narrow the field of judicial inquiry—a familiar result of the finality accorded by statute to administrative findings. Cf. *Gray* v. *Powell*, 314 U. S. 402, 411–412. The same principles answer the contention that Article 15 conflicts with the court's jurisdiction under Section 145 of the Judicial Code, a contention unsuccessfully urged in almost identical form by the respondent in *United States* v. *McShain*, 308 U. S. 512. See Respondent's brief in No. 43, October Term, 1939, pp. 9–10, 11–12.[10]

3. Declining to accord finality to the ruling of the head of the department, the court below decided as an original question that the Government was the responsible cause of the increase in respondents' wage rates. While the construction and validity of Article 15 relating to finality present the important issues for review; and if that issue is decided in accord with our contentions the question whether there was a breach of

[10] The observation in Judge Madden's concurring opinion that a decision by a contracting officer would be "meaningless" because that officer could make an award only for, but not against, the Government is unsound. The decision of the Government officers may be of considerable value to an aggrieved party seeking redress (see *United States* v. *Blair*, 321 U. S. 730, 737–738) and is often accorded finality even where the Government's fiscal agents refuse to accept it. See e. g., *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, 325–326; *Coomb Company* v. *United States*, 100 C. Cls. 240, 247.

contract need not be decided, we shall maintain, if it becomes relevant, that there was no breach of contract by the Government. It seems plain, though two members of the court concluded otherwise, that there was no breach of Article 19, since the Government imposed no obligation on the respondent to pay higher wages than the minimum fixed in the contract, and since under Section 12 of the specifications the Government disclaimed liability for additional compensation because of higher wage rates than those contained "herein." Nor was there a breach of an implied undertaking not to make performance more expensive. The inference that in publishing invitations to bid on the superstructure with higher specified minimum wage rates the Government made it "well nigh inevitable" that respondents' employees would effectively insist on the higher wage is, we submit, not properly to be drawn from the record.

At the time respondents entered into the contract, the Building Trade Employers' Association of Chicago and the Unions of the City of Chicago had an agreement which fixed the same minimum rates as those provided in the contract, and which was to expire on May 31, 1936 (Fdg. 19).[11]

[11] The fact that the head of the department incorrectly concluded that that agreement expired January 1, 1936, is of no significance. In fact, the later date would suggest that respondent was more completely protected by the wage agreement.

It was only shortly after that date that respondents completed their work on the foundation (Fdg. 14). The superstructure could of course not be erected until the foundations were completed, but it was necessary that the contract for the superstructure be advertised and entered into in advance, so that work thereon could commence without delay after respondents had completed the foundation. Accordingly, the invitation to bid upon the superstructure work was issued in February 1936, but the increased wage rates specified therein necessarily would not take effect until after respondents' contract had been completed. Notwithstanding the contrary inference drawn by the court below, there is nothing to indicate that the Government had any reason to believe that its announcement that higher rates would be required in the future would entail a retroactive change in respondents' wage agreement. In this aspect, the Government's action was even more clearly reasonable than in *Le-Veque* v. *United States*, 96 C. Cls. 250, where the court below held that an increase by the Government of the minimum wage rates on other projects in the same city, which were under way at the same time as the plaintiff's, did not constitute a breach of contract. See also *Dravo Corp.* v. *United States*, 93 C. Cls. 734, 758. And nothing in the instant contract bound the Government to prescribe the same minimum wage rates for

the later phases of the project as it had prescribed for the foundations.

4. The question is one of importance. It is a matter of common knowledge that the United States annually enters into a vast number of contracts many of which contain a clause similar to Article 15 here involved providing for administrative settlement of disputes. If such a stipulation can be rendered inapplicable by phrasing the dispute in terms of the breach of an express or implied term of the contract, the effect of the submission to administrative decision will be nullified in most cases, even where the dispute centers on a purely factual question. It is respectfully submitted that the decision below, marking a distinct departure from the rationale of similar cases heretofore decided by this Court, should be reviewed.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 5, 1944.

APPENDIX

CONTRACT PROVISIONS

ART. 3. *Changes.*—The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this Contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this Contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the Contracting Officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

* * * * *

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the Contracting Officer shall be submitted to the Head of the Department. Except as

otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed.

* * * * * *

ART. 18. *Wages.*—(a) There shall be paid each employee engaged on the project in the trade or occupations listed in the Specification, the hourly, weekly, or monthly wage prescribed for the same in the Specification. If, after the award of this contract, it becomes necessary to employ any person in a trade or occupation not listed in the Specification, such person shall be paid an hourly, weekly, or monthly rate of wage fairly comparable to the rates contained in the Specification as shall be approved by the head of the department and such wage rates shall be retroactive to the time of the initial employment of such person in such trade or occupancy.

(b) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work; and the Contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee, and shall furnish the Contracting Officer with a sworn statement thereof on demand.

All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

ART. 19. (a) The wage rates established in the Specification shall be subject to change by the Federal Emergency Administration of Public Works. In the event that the Federal Emergency Administration of Public Works establishes different wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the Contractor, whether under this contract or any subcontract.

(b) The Contractor and each subcontractor shall prepare the pay rolls upon forms to be prescribed and in accordance with instructions to be furnished by the Works Progress Administration. Not later than the third day following the payment of wages, a certified legible copy of each pay roll, whether paid by the Contractor or any subcontractor, shall be transmitted by the Contractor to such office as may be designated by the Works Progress Administration. The Contractor and each subcontractor shall submit reports at such times and on such forms as may be required by the Works Progress Administration, covering purchases of, and requisitions for, materials, together with such other information as may be

required to determine the progress and status of the completion of the work on the project.

(c) The Contractor and each subcontractor shall report to the United States Department of Labor monthly within 5 days after the close of each calendar month, upon forms to be prescribed, and in accordance with instructions to be furnished, by the United States Department of Labor, covering the number of persons on their respective pay rolls directly connected with the project, the aggregate amount of such pay rolls and man-hours work, and an itemized statement of the total expenditures for materials. The Contractor shall also furnish to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

(d) The Works Progress Administration through its authorized agents shall have the right to inspect all work as it progresses and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract.

SPECIFICATIONS

Paragraph 1 of Section 12 of Division I of the specifications provided that:

> Subject to the specification, general conditions and the contract, there shall be paid each Employee in the Trade or Occupation listed below not less than the hourly wage rate set opposite same. * * *

Carpenters	$1.2125
Cement finishers	1.3125
Hoisting engineers	1.3125
Common laborers	.825

Paragraph 2 of Section 12, *supra*, provided that:

> The above wage rates are subject to review and adjustment by the Federal Emergency Administrator of Public Works, as provided in Article 19 (a) of the contract.

Paragraph 4 of Section 12, *supra*, provided that:

> The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor.

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